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WITNESSES - PRIVILEGE OF COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT APPLICABLE TO NONJUDICIAL PROCEEDINGS

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WITNESSES — PRIVILEGE OF COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT APPLICABLE TO NONJUDICIAL PROCEEDINGS — Pursuant to section 43 of the city charter, the City Council of New York appointed a special committee to investigate charges of negligence and maladministration in the treatment of patients at Lincoln Hospital. Subpoenas duces tecum were served upon the commissioner of hospitals and upon the medical superintendent of Lincoln Hospital requiring the production of hospital records, including case records relating to certain named patients. The commissioner refused to produce any of the case cards or records, justifying his position on the ground that the physician-patient privilege was applicable to legislative investigations. The New York Civil Practice Act, section 354, provides that the privilege shall "apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by . . . the patient." The appellate division unanimously affirmed the lower court's order requiring compliance with the subpoena. The commissioner appealed. *Held*, that under the physician-patient privilege, the refusal to produce the case cards or records was proper. The privilege is not limited to judicial proceedings, but extends to legislative investigations as well. *New York City Council v. Goldwater*, 284 N. Y. 296, 31 N. E. (2d) 31 (1940).

The principal case is the first one squarely raising the issue whether the physician-patient privilege applies to nonjudicial proceedings.[1] Although the privilege ought not to be limited to regularly constituted courts and should clearly encompass those functions of administrative tribunals which are strictly judicial, that is so because the proceeding is still judicial in nature whether the tribunal is called a "board" or a "court."[2] But as to administrative and legislative investigations a more difficult question is presented. Unlike privileged communications between spouses and between attorney and client, which have a common-law background, the physician-patient privilege is purely statutory.[3] Fostered by the medical profession for the avowed purpose of encouraging full disclosure by the patient without apprehension of publicity, legislation has established the privilege in a majority of jurisdictions.[4] Since the privilege is statu-

[1] However, the court in the principal case was able to find support in the dictum of one of its own decisions. Hirshfield v. Hanley, 228 N. Y. 346, 127 N. E. 252 (1920).

[2] Cf. Hamilton v. P. E. Johnson & Sons, 224 Iowa 1097, 276 N. W. 841 (1937).

[3] 28 R. C. L. 532 (1921); 70 C. J. 439 (1935).

[4] 8 WIGMORE, EVIDENCE, 3d ed., § 2380 (1940), where the author cites all the statutes in an extensive footnote.

tory, it is imperative that the particular statute be examined in each case. As to construction of such statutes, two views are prevalent. One favors a strict construction on the theory that the statutes are in derogation of the common law.[5] On the other hand, most courts say that the statutes are remedial and consequently should be liberally construed.[6] New York favors a liberal construction.[7] The decision in the principal case can easily be justified, therefore, on the basis of two factors: (1) the court's theory of construction, operating upon (2) the words of the statute stating that the privilege is to apply to "any examination." [8] Whether the absence of one, or both, of these factors would have led to a different result is, of course, conjectural. The privilege may be limited to judicial proceedings by the peculiar language of the statute. In jurisdictions where the privilege exists as to proceedings in "courts," [9] or "civil actions," [10] or "legal proceedings," [11] the extension of the privilege to legislative investigations would be precluded. Also, in Iowa, where it has been held that the statute granting the privilege is a mere rule of evidence and therefore not binding on the workmen's compensation commission,[12] the court might conceivably say that neither is a legislative committee bound by such rules of evidence. Even under the usual wording of the statutes, a court following a strict construction theory might well refuse to extend the privilege beyond judicial proceedings.[13] A conflict of policies is presented; and since the policy behind the privilege is not a strong one to

[5] William Laurie Co. v. McCullough, 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337 (1910); Gulf, M. & N. R. R. v. Willis, 171 Miss. 732, 157 So. 899, 158 So. 551 (1934).

[6] Jacobs v. City of Cedar Rapids, 181 Iowa 407, 164 N. W. 891 (1917); State v. Miller, 105 Wash. 475, 178 P. 459 (1919); Arizona & N. M. Ry. v. Clark, (C. C. A. 9th, 1913) 207 F. 817.

[7] Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mutual Aid Assn., 126 N. Y. 450, 27 N. E. 492 (1891).

[8] There was another factor in the case which a court desirous of reaching a contrary result might have considered. The hospital in question was a city hospital, and some authorities have suggested a distinction between the records of private and city or state hospitals. 8 WIGMORE, EVIDENCE, 3d ed., § 2382 at p. 820 (1940); Wills v. National Life & Accident Ins. Co., 28 Ohio App. 497, 162 N. E. 822 (1928). The cases most frequently involve state hospitals for the insane. Denying the privilege, State v. Murphy, 205 Iowa 1130, 217 N. W. 225 (1928). Contra, Linscott v. Hughbanks, 140 Kan. 353, 37 P. (2d) 26 (1934).

[9] D. C. Code (1930), tit. 9, § 20.

[10] Ariz. Code Ann. (1939), § 23-103.

[11] Miss. Code Ann. (1930), § 1536.

[12] Hamilton v. P. E. Johnson & Sons, 224 Iowa 1097, 276 N. W. 841 (1937), the Iowa Workmen's Compensation Act providing that the industrial commissioner should not be bound by common-law or statutory rules of evidence. It is of interest to note, in this connection, that Iowa purports to construe liberally the statute granting the physician-patient privilege. Jacobs v. City of Cedar Rapids, 181 Iowa 407, 164 N. W. 891 (1917).

[13] But see the note on the instant case in 54 HARV. L. REV. 705 (1941).

begin with,[14] it would not be improper, in the absence of compelling language, to have it yield to a stronger policy, that of protecting all patients from unskilled and negligent medical treatment.[15] That it has yielded already in several respects is evident from the decisions.[16] A denial of this particular privilege in legislative proceedings would not necessarily lead to a like result in cases arising under other privileges. As pointed out by the dissenting opinion in the instant case, each privilege rests upon its own peculiar policy and background.

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[14] For a criticism of the policy behind the privilege, see 8 WIGMORE, EVIDENCE, 3d ed., § 2380a (1940).

[15] In this regard possibilities for distinction are to be noted. The strength of the public policy will not be the same in all legislative investigations. The purpose for which the evidence is introduced directly bears on the question. Since, in the principal case, the hospital itself was being investigated, the public interest in the admission of the evidence was particularly strong.

[16] Where the communication made to the physician was for an unlawful purpose, the privilege does not apply. Seifert v. State, 160 Ind. 464, 67 N. E. 100 (1903). Nor can privilege be invoked by a defendant in a criminal prosecution as to information acquired by a physician attending the victim. Maddox v. State, 173 Miss. 799, 163 So. 449 (1935). In some jurisdictions, a physician can testify to testator's mental condition in a will contest. In re Swain's Estate, 189 Iowa 28, 174 N. W. 493 (1919).